

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Solarwave Limited

Of: 19 Lodge Lane, The Rear, Grays, RM17 5RY

1. The Information Commissioner ("the Commissioner") has decided to issue Solarwave Limited ("Solarwave") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is in relation to a serious contravention of regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR").
2. This notice explains the Commissioner's intended decision.

Legal framework

3. Solarwave, whose registered office is given above (Companies House Registration Number: 11327931) is the organisation stated in this notice to have used a public electronic communications service for the purpose of making unsolicited calls for the purposes of direct marketing contrary to regulation 21 of PECR.
4. Regulation 21 applies to the making of unsolicited calls for direct marketing purposes. It means that if a company wants to make calls promoting a product or service to an individual who has a telephone

number which is registered with the Telephone Preference Service Ltd ("TPS"), then that individual must have given their consent to that company to receive such calls.

5. Regulation 21 paragraph (1) of PECR provides that:

"(1) A person shall neither use, nor instigate the use of, a public electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where-

- (a) the called line is that of a subscriber who has previously notified the caller that such calls should not for the time being be made on that line; or
- (b) the number allocated to a subscriber in respect of the called line is one listed in the register kept under regulation 26."

6. Regulation 21 paragraphs (2), (3), (4) and (5) provide that:

- "(2) A subscriber shall not permit his line to be used in contravention of paragraph (1).
- (3) A person shall not be held to have contravened paragraph (1)(b) where the number allocated to the called line has been listed on the register for less than 28 days preceding that on which the call is made.
- (4) Where a subscriber who has caused a number allocated to a line of his to be listed in the register kept under regulation 26 has notified a caller that he does not, for the time being, object to such calls being made on that line by that caller, such calls may be made by

that caller on that line, notwithstanding that the number allocated to that line is listed in the said register.

(5) Where a subscriber has given a caller notification pursuant to paragraph (4) in relation to a line of his—

(a) the subscriber shall be free to withdraw that notification at any time, and

(b) where such notification is withdrawn, the caller shall not make such calls on that line.”

7. Under regulation 26 of PECR, the Commissioner is required to maintain a register of numbers allocated to subscribers who have notified them that they do not wish, for the time being, to receive unsolicited calls for direct marketing purposes on those lines. The Telephone Preference Service Limited (“TPS”) is a limited company which operates the register on the Commissioner’s behalf. Businesses who wish to carry out direct marketing by telephone can subscribe to the TPS for a fee and receive from them monthly a list of numbers on that register.
8. Section 122(5) of the Data Protection Act 2018 (“DPA18”) defines direct marketing as “the communication (by whatever means) of any advertising material which is directed to particular individuals”. This definition also applies for the purposes of PECR (see regulation 2(2) PECR and Schedule 19 paragraphs 430 & 432(6) DPA18).
9. Consent in PECR is now defined, from 29 March 2019, by reference to the concept of consent in Regulation 2016/679 (“the GDPR”): regulation 8(2) of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019. Article 4(11) of the GDPR sets out the following definition: “‘*consent*’ of the

data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her".

10. "Individual" is defined in regulation 2(1) of PECR as "a living individual and includes an unincorporated body of such individuals".
11. A "subscriber" is defined in regulation 2(1) of PECR as "a person who is a party to a contract with a provider of public electronic communications services for the supply of such services".
12. Section 55A of the DPA (as applied to PECR cases by Schedule 1 to PECR, as variously amended states the Commissioner may serve a person with a monetary penalty notice if the Commissioner is satisfied that –

"(a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by the person, and

(b) subsection (2) or (3) applies.

(2) This subsection applies if the contravention was deliberate.

(3) This subsection applies if the person –

(a) knew or ought to have known that there was a risk that the contravention would occur, but

(b) failed to take reasonable steps to prevent the contravention."

13. The Commissioner has issued statutory guidance under section 55C (1) of the DPA about the issuing of monetary penalties that has been published on the ICO's website. The Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 prescribe that the amount of any penalty determined by the Commissioner must not exceed £500,000.
14. PECR implements Directive 2002/58/EC, and Directive 2009/136/EC which amended the earlier Directive. Both the Directive and PECR are "*designed to protect the privacy of electronic communications users*": *Leave.EU & Eldon Insurance Services v Information Commissioner* [2021] UKUT 26 (AAC) at paragraph 26. The Commissioner seeks to interpret and apply PECR in a manner consistent with the purpose of the Directive and PECR of ensuring a high level of protection of the privacy of individuals, and in particular the protections provided from receiving unsolicited direct marketing communications which the individual has not consented to receive.
15. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the DPA18: see paragraph 58(1) of Schedule 20 to the DPA18.

Background to the case

16. Solarwave first came to the attention of the Commissioner in September 2020 when complaints about unsolicited marketing calls from two specific calling line identifiers ("CLI's") were identified from the monthly reports received from the Telephone Preference Service ("TPS").

17. The Commissioner made enquiries with the relevant Communications Service Provider ("CSP") which confirmed that the CLI's in question, and a number of others, had been allocated to Solarwave. They provided detailed call records for the period between 2 January 2020 and 2 October 2020 which showed that, over that time period, Solarwave had made 144,937 calls, of which, 73,217 were made to individual subscribers whose number had been registered with the TPS for not less than 28 days. The Commissioner was able to establish that since January 2020 there had been a number of complaints made regarding calls from CLI's attributed to Solarwave via both the Commissioner's online reporting tool, and the Telephone Preference Service ("TPS").
18. The following are examples of the complaints received by the ICO and TPS:
- *"They said it was a follow up call to talk about solar panels, but we already have solar panels so there's no way my husband and I would have asked them to call us back to talk about solar panels. I said that I didn't want to talk to them, and they then called me an idiot and hung up. The caller was rude - calling me an idiot because I didn't want to take his call."*
 - *"My mother who is aged 90 has solar panels. She has been called a number of times by Solarwave suggesting that they could inspect her panels as they may be faulty. This is causing her distress and they do not consent the storage of her Personal Data - she has never dealt with them and they were not the installers of her system"*
 - *"Solar panel maintenance. Asked them to stop calling before. Tried ignoring the frequent calls by not answering. Still ringing so picked up*

yesterday and told them again and that we are registered with you.

Even more annoying now as we are now ex-directory. These companies are the bane of a lot of people's lives and need to be stopped. As if life isn't difficult enough at the moment!"

- *"Asking about servicing my solar PV system. They said that they had obtained my number from a database of installed PV systems. I told them I was TPS registered and they terminated the call."*

19. The Commissioner sent an initial investigation letter to Solarwave on 12 October 2020, setting out her concerns with Solarwave's PECR compliance and asking for details of call volumes and evidence of consent, amongst other information.
20. A response to this initial investigation letter was provided on 13 October 2020, supplying a copy of their call script and a brief explanation of their processes. In terms of its methods for obtaining data, Solarwave advised that it used data purchased from third party lead generation suppliers ("third-party data providers"); and via direct lead generation through [REDACTED] campaigns. Solarwave explained that it was unable to provide evidence of consent for the calls because "at that time, we had no measure in places to ensure that persons being contacted were not registered with the Telephone Preference Service, other than requesting from our data suppliers". It explained that as of 18 September 2020 it had changed its processes and now screened all purchased data from an alternative provider to ensure compliance. It also confirmed that it holds an internal suppression list.
21. On 14 October 2020 the Commissioner sought further information from Solarwave in respect of the third-party data providers from whom data

was obtained including copy contracts and any due diligence carried out in relation to consent. It was also asked about the apparent lack of TPS screening, the new procedures implemented and staff training. Solarwave responded on 15 October 2020.

22. In its response it confirmed that calls made since January 2020 had not been screened against the TPS, as it was their understanding that the data had already been screened prior to purchasing. An invoice was provided from one of its third-party data providers but copy contracts were neglected to be provided as requested. They also did not provide any written policies in response to their updated procedures with their alternative data provider. Instead, they provided a picture of a database showing numbers, names and addresses stating that "we put our data into a CVS file that can then be uploaded into the system and screened."
23. The missing information was requested by the Commissioner on 16 October 2020 and a response from Solarwave was received on the same day. However, again the document provided was not a contract with its third-party data provider but a further invoice from the provider dated 19 December 2019 for various records.
24. Following an end of investigation letter sent by the Commissioner on 12 November 2020, Solarwave responded to reiterate that it had no intention of giving excuses regarding the infringement, just that it was under the impression the purchased data was screened against the TPS. However, it highlighted that it has since employed a third party who will screen the data every 28 days as suggested by the TPS.
25. The Commissioner is satisfied that the 73,217 calls were all made for the purposes of direct marketing as defined by section 122(5) DPA18.

26. The Commissioner has made the above findings of fact on the balance of probabilities.
27. The Commissioner has considered whether those facts constitute a contravention of regulation 21 of PECR by Solarwave and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

28. The Commissioner finds that Solarwave contravened regulation 21 of PECR.
29. The Commissioner finds that the contravention was as follows:
30. Between 2 January 2020 and 2 October 2020, Solarwave used a public telecommunications service for the purposes of making 73,217 unsolicited calls for direct marketing purposes to subscribers where the number allocated to the subscriber in respect of the called line was a number listed on the register of numbers kept by the Commissioner in accordance with regulation 26, contrary to regulation 21(1)(b) of PECR. This resulted in 30 complaints being made to the TPS and the Commissioner.
31. The Commissioner is also satisfied for the purposes of regulation 21 that these 73,217 unsolicited direct marketing calls were made to subscribers who had registered with the TPS at least 28 days prior to receiving the calls, and they had not given their prior consent to Solarwave to receive calls.

32. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

33. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulation 21 by Solarwave arising from the organisation's activities over a nine month period, and this led to a substantial number (73,217) of unsolicited direct marketing calls being made to subscribers who were registered with the TPS, and a number of complaints being made as a result. Furthermore, Solarwave has been unable to demonstrate it held valid consent for the purpose of these calls.
34. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

35. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that Solarwave's actions which constituted that contravention were deliberate actions (even if Solarwave did not actually intend thereby to contravene PECR).
36. The Commissioner does not consider that Solarwave deliberately set out to contravene PECR in this instance.

37. The Commissioner has gone on to consider whether the contravention identified above was negligent. This consideration comprises two elements:
38. Firstly, she has considered whether Solarwave knew or ought reasonably to have known that there was a risk that this contravention would occur. She is satisfied that this condition is met.
39. The Commissioner has published detailed guidance for companies carrying out marketing explaining their legal requirements under PECR. This guidance explains the circumstances under which organisations are able to carry out marketing over the phone, by text, by email, by post or by fax. Specifically, it states that live calls must not be made to subscribers who have told an organisation that they do not want to receive calls; or to any number registered with the TPS, unless the subscriber has specifically consented to receive calls. The Commissioner has also published detailed guidance on consent under the GDPR. In case organisations remain unclear on their obligations, the ICO operates a telephone helpline. ICO communications above previous enforcement action where businesses have not complied with PECR are also readily available.
40. Standard practice of the TPS is to contact the organisation making the calls on each occasion a complaint is made. It is therefore reasonable to believe that Solarwave would have received a notification from the TPS for each of the complaints being made in this case. That there were 24 complaints made to the TPS alone over the period of the contravention should have made Solarwave aware of the risk that such contraventions may occur, and were indeed occurring.

41. It is therefore reasonable to suppose that Solarwave should have been aware of its responsibilities in this area.
42. Secondly, the Commissioner has gone on to consider whether Solarwave failed to take reasonable steps to prevent the contravention. Again, she is satisfied that this condition is met.
43. The Commissioner's direct marketing guidance makes clear that organisations acquiring marketing lists from a third party must undertake rigorous checks to satisfy themselves that the personal data was obtained fairly and lawfully, that their details would be passed along for direct marketing to the specifically named organisation in the case of live calls, and that they have the necessary consent. It is not acceptable to rely on assurances given by third party providers without undertaking proper due diligence.
44. Solarwave failed to carry adequate due diligence checks on its third-party data providers and was unable to show that it had adequate contracts in place. They neglected to ensure that the data purchased had been screened against the TPS every 28 days as required. These are basic requirements for any organisations conducting a live direct marketing campaign.
45. Reasonable steps in these circumstances may also have included asking its third-party data providers for evidence that the subscribers had specifically consented to receiving calls from Solarwave; screening the data it intended to rely on against the TPS register itself (regardless of any assurances that might have been given to it by the third-party data providers); and ensuring an effective suppression system was in place for individuals who did not wish to be contacted.

46. Given the volume of calls and complaints, it is clear that Solarwave failed to take those reasonable steps.
47. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

48. The Commissioner has taken into account the following **aggravating features** of this case:
- The complaints received by both the Commissioner and the TPS suggest that Solarwave was seen to be rude and persistent when making calls, ignoring stop requests.
 - The actions of Solarwave were carried out to generate business and to increase profits, gaining an unfair advantage on those businesses complying with the PECR;
 - The Commissioner produces clear guidance via its website on the rules of direct marketing. She also operates a helpline should organisations be unsure and require further clarification. The Commissioner has previously taken openly publicised regulatory action against other organisations within the same sector and it is therefore reasonable to expect informed awareness of PECR within the industry in which Solarwave operate;
 - Solarwave continued to make unsolicited calls to subscribers pending the outcome of the Commissioner's investigation and complaints continue to be received. Solarwave's website states that it is an accredited member of two trader organisations. Enquiries undertaken by the Commissioner in December 2020 showed no traces of their membership. Indeed, one

of the two trade bodies advised the Commissioner that the Company had been expelled on 21 October 2020.

49. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A (1) DPA have been met in this case. She is also satisfied that the procedural rights under section 55B have been complied with.
50. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking. In reaching her final view, the Commissioner has taken into account representations made by Solarwave on this matter dated 26 March 2021.
51. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
52. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
53. The Commissioner has attempted to consider the likely impact of a monetary penalty on Solarwave. As part of its representations Solarwave provided the Commissioner with some financial information in response to the Notice of Intent. However, following a review of the information received, further financial information was requested to clarify its position on 24 April 2021. No response to this request was received. She has decided on the information that is available to her, that a penalty remains the appropriate course of action in the circumstances of this case.
54. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The making of unsolicited direct marketing calls is a matter of significant public

concern. A monetary penalty in this case should act as a general encouragement towards compliance with the law, or at least as a deterrent against non-compliance, on the part of all persons running businesses currently engaging in these practices. This is an opportunity to reinforce the need for businesses to ensure that they are only telephoning consumers who want to receive these calls.

55. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

56. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£100,000 (One hundred thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

57. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **7 July 2021** at the latest. The monetary penalty is not kept by the Commissioner but will be paid into the Consolidated Fund which is the Government's general bank account at the Bank of England.
58. If the Commissioner receives full payment of the monetary penalty by **6 July 2021** the Commissioner will reduce the monetary penalty by 20% to **£80,000 (Eighty thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.

59. There is a right of appeal to the First-tier Tribunal (Information Rights) against:
- (a) the imposition of the monetary penalty and/or;
 - (b) the amount of the penalty specified in the monetary penalty notice.
60. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
61. Information about appeals is set out in Annex 1.
62. The Commissioner will not take action to enforce a monetary penalty unless:
- the period specified within the notice within which a monetary penalty must be paid has expired and all or any of the monetary penalty has not been paid;
 - all relevant appeals against the monetary penalty notice and any variation of it have either been decided or withdrawn; and
 - the period for appealing against the monetary penalty and any variation of it has expired.
63. In England, Wales and Northern Ireland, the monetary penalty is recoverable by Order of the County Court or the High Court. In Scotland, the monetary penalty can be enforced in the same manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

Dated the 4th day of June 2021.

Andy Curry
Head of Investigations
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

SECTION 55 A-E OF THE DATA PROTECTION ACT 1998

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 55B(5) of the Data Protection Act 1998 gives any person upon whom a monetary penalty notice has been served a right of appeal to the First-tier Tribunal (Information Rights) (the 'Tribunal') against the notice.

2. If you decide to appeal and if the Tribunal considers:-

- a) that the notice against which the appeal is brought is not in accordance with the law; or
- b) to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised her discretion differently,

the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.

3. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

General Regulatory Chamber
HM Courts & Tribunals Service
PO Box 9300
Leicester
LE1 8DJ

Telephone: 0300 123 4504
Email: grc@justice.gov.uk

- a) The notice of appeal should be sent so it is received by the Tribunal within 28 days of the date of the notice.
 - b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.
4. The notice of appeal should state:-
- a) your name and address/name and address of your representative (if any);
 - b) an address where documents may be sent or delivered to you;
 - c) the name and address of the Information Commissioner;
 - d) details of the decision to which the proceedings relate;
 - e) the result that you are seeking;
 - f) the grounds on which you rely;
 - g) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;
 - h) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension of time

and the reason why the notice of appeal was not provided in time.

5. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.

6. The statutory provisions concerning appeals to the First-tier Tribunal (Information Rights) are contained in section 55B(5) of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).